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In the Supreme Court

of the United States

OCTOBER TERM 1967

No. [redacted] 714

JONES LUMBER COMPANY,

Petitioner,

v.

DEL NORTE COUNTY,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE DISTRICT COURT OF THE STATE OF CALIFORNIA IN AND FOR THE FIRST APPELLATE DISTRICT

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To the Honorable Chief Justice and the Associate Justices of the Supreme Court of the United States:

Petitioner, JONES LUMBER COMPANY, plaintiff-respondent below, respectfully prays a writ of certiorari issue to review the judgment of the District Court of Appeal of the State of California, in and for the First Appellate District, entered in the above-entitled case on June 7, 1967.

OPINIONS BELOW

The opinion of the Superior Court of the State of California in and for the County of Del Norte, giving judgment for petitioner, is unreported and is set forth at R. 108. The opinion to be reviewed, that is, the opinion of the Court of Appeal of the State of California, First Appellate District, Division Three, reversing the judgment of the Superior Court insofar as it awarded a refund to petitioner, is reported at 59 Cal. Rptr. 644 and 251 A.C.A. 736, and is appended hereto at pages 21-27.

No written opinion was rendered by the Supreme Court of the State of California in denying petitioner's petition for a hearing.

JURISDICTION

The order of the Supreme Court of the State of California denying petitioner's petition for a hearing, was dated and entered July 28, 1967 (R. 263). The previous judgment of the Appellate District Court thereupon became final.

This Court has jurisdiction to review the judgment in question by writ of certiorari because petitioner claims a right under the Constitution of the United States. Jurisdiction is invoked under 28 U.S.C. § 1257 (3).

QUESTION PRESENTED

Where a state court finds that a taxpayer's property was intentionally and systematically assessed and taxed at a higher rate than that of other taxpayers of the same class, in violation of the United States Constitution, can the state court deny a refund on the ground that his property was assessed at less than full value?

CONSTITUTIONAL PROVISION INVOLVED

Section 1 of the 14th Amendment to the Constitution of the United States:

> "All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the state wherein they reside. No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any state deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws."

STATEMENT OF THE CASE

Plaintiff is the owner of timberlands in Del Norte County, California. In 1963, the Del Norte County Assessor adopted a scheme of assessment for timberlands as follows: the Assessor determined the "retail value" of all old growth timber in the county to be $21 per thousand board feet, and the "retail value"

of *all* timberland in the county to be $20 per acre. He then established base values, for assessment purposes, of *all* timber and timberlands in the county by discounting the foregoing figures 75%, to $5.25 and $5 respectively. Finally, he assessed the individual timberland owners by reducing the foregoing base figures by percentages which varied from owner to owner depending *solely* upon the size of each owner's total holdings in Del Norte County: the larger the owner's total holding, the larger his discount. As a result of this discount formula, the petitioner received only a 9% discount from base value, while the *admittedly similar* holdings of the Simpson companies were discounted 52%. (Simpson's holdings in Del Norte County are 15 times larger than petitioner's.)

Taxes were levied on the basis of the foregoing assessments. Petitioner paid its taxes under protest and sued to recover, utilizing a procedure for refund provided by California law, *Revenue and Taxation Code*, §§ 5136-5143. In its complaint in the Superior Court (R. 4), petitioner alleged that the Assessor's discount scheme was invalid, for the following reasons:

1. It violated a California constitutional provision requiring assessment of sectionalized lands by sections or fractions thereof.

2. It was a willful and systematic discriminatory assessment. (This constitutes an allegation of a violation of petitioner's rights under the 14th Amendment to the Constitution of the United States.)

3. It violated California constitutional and statutory provisions requiring equal assessment of cultivated or uncultivated lands of the same quality and similarly situated.

Petitioner asked for a refund of the portion of its taxes attributable to the fact that it was assessed at a higher rate than the Simpson companies.

The Superior Court of Del Norte County found for petitioner, and gave judgment for the refund for which petitioner prayed, thereby placing petitioner on an equal basis with the Simpson companies.

Del Norte County appealed from this judgment to the Appellate Court of the First Appellate District, Division Three. In its decision of June 7, 1967, the Appellate Court found that the Assessor's scheme ignored relevant market value factors, and that it was a systematic discrimination between taxpayers of the same class, and therefore held it to be in violation of California statutes, the California Constitution and the Constitution of the United States (App. pp. 23-5). However, the Appellate Court reversed as to the refund granted petitioner, and awarded petitioner only its costs. The Appellate Court stated that California law requires all property to be assessed at its true value, that petitioner had not shown that its property was assessed at more than true value, and that a reduction would therefore but aggravate the violation resulting from the fact that plaintiff was assessed at less than full value (App. p. 26).

This decision gave rise to the federal question

herein presented for review: Can a state court, having found an assessment to be discriminatory and in violation of the United States Constitution, refuse a refund on the ground that the property was assessed at less than full value?

Petitioner made timely application to the Supreme Court of the State of California for a hearing on the judgment of the Appellate Court. In its petition for a hearing, petitioner argued that the Appellate Court's refusal to affirm the refund was a state action in violation of the 14th Amendment of the United States Constitution (R. 247).

On July 28, 1967, the petition was denied without opinion.

REASONS FOR GRANTING THE WRIT

The California court has decided a federal question of substance in a way directly contradictory to applicable decisions and applicable logic of this Court.

This court, in a series of decisions over many decades, has consistently held that the 14th Amendment guarantees the ad valorem taxpayer equality with other taxpayers of the same class in the assessment and taxation of his property. Systematic intentional discrimination between property owners of the same class has been struck down despite a variety of justifications which have found acceptance in the lower courts: For example, this court has held that a discriminatory assessment must be remedied although it

does not exceed true value, or although the taxpayer may bring proceedings to have other taxpayers' assessments raised.

In the instant case, the California Court has now declared that it cannot remedy a systematic discrimination between taxpayers of the same class, on the sole ground that the discriminatory assessment valued the taxpayer's property at less than full value. This court has never said in so many words that discriminatory taxation must be remedied although the assessment figure is less than full value. However, the principles of past cases permit no other conclusion, and it is obvious that this court's mandate for equality will be meaningless if the wide-spread practice of assessment at less than full value can be a shield to discriminatory taxation. This court must make it plain that discriminatory taxation cannot be perpetrated by *any means*.

The evil potential in the California ruling is magnified by the fact that the unremedied discrimination in this case favored large timberland owners at the expense of their smaller competitors. The taxing authority must not be permitted to join with powerful interests to drive out their competitors. The California court's decision is an invitation to such collusion, and a carte blanche for discrimination. The carte blanche is not limited to the timber industry; the California court's reasoning sanctions discrimination within any class of property so long as that discrimination is implemented by fractional assessments.

California is the nation's most populous state, and the decisions of its courts are cited with respect throughout the nation. History teaches that state courts, perhaps influenced by local needs for revenue, have not shared this high court's determination to reject excuses for discriminatory taxation. This Court must act to protect the taxpayers of the nation's most populous state, and to make plain to courts and assessors throughout the nation that this Court's previous mandates for equality cannot be thwarted by the simple expedient of assessment below full value.

I

Failure of petitioner to show an overvaluation is no justification for a refusal to remedy an admittedly discriminatory assessment.

The California court expressly *held* this assessment to be discriminatory:

> "There is no conceivable basis upon which this discount scheme can be held to be other than discriminatory. . . . We recognize that the elements of accessibility, terrain, species, quality, logging conditions and distance from the market are factors to be considered in appraisal and assessment of timber and timberlands. . . . But the system of discounts adopted by the assessor and board is based solely on total ownership. . . . We *hold* that the discount system necessarily works discrimination in assessment and taxation, and must be stricken down." (App. p. 25) (emphasis added).

The court below cited opinions of this court that

inequality of assessment contravenes the taxpayer's rights under the 14th Amendment (App. p. 23).

Nevertheless, relief was denied.

> "Plaintiff has not shown an overassessment of his property." (App. p. 26).

This Court has expressly rejected the notion that a discriminatory assessment cannot be reduced if the assessment does not exceed true value.

In *Sioux City Bridge Company* v. *Dakota County*, 260 U.S. 441, 43 S. Ct. 190, 67 L. Ed. 340 (1922), as here, the taxpayer could not show an overvaluation: his property was valued at 100% of its true value, while other taxpayers of the same class were intentionally assessed at a lower rate. There, as here, the taxpayer asked that his assessment be reduced to that of the favored taxpayers of his class. The state court denied this relief, following *Lincoln Telephone & Telegraph Company* v. *Johnson County*, 166 N.W. 627 (Neb. 1918), which held that reduction of assessments was barred by the Nebraska Statute requiring assessment at actual value. (See the opinion as quoted 260 U.S. at 443, 67 L.Ed. at 432.) The reasoning of the California court in the decision below is identical: California law requires assessment at full value; therefore, an assessment which does not exceed full value cannot be reduced (App. p. 26).

This Court in *Sioux City* rejected this mischievous excuse for discrimination, stating as follows:

> ". . . This court holds that the right of the

taxpayer whose property alone is taxed at 100 per cent of its true value is to have his assessment reduced to the percentage of that value at which others are taxed, *even though this is a departure from the requirement of statute.* The conclusion is based on the principle that *where it is impossible to secure both the standards of the true value, and the uniformity and equality required by law, the latter requirement is to be preferred as the just and ultimate purpose of the law . . .*" (Emphasis added.) 67 L. Ed. at 343, 260 U.S. at 446.

The California court has *reversed* the priority established by this Court; it has preferred the standard of true value to the requirement of uniformity and equality.

II

The fact that petitioner's land is undervalued is no justification for a refusal to remedy an admittedly discriminatory assessment.

> "Plaintiff's assessment, which already has been invalidly reduced below true value, should not be still further reduced. Plaintiff has not shown an overassessment of his property. Rather, he has shown that it was assessed at too little, although still at a higher rate than that of Simpson." (Opinion below, App. p. 26).

In other words, discrimination in taxation cannot be remedied where the assessment figure is less than full value.

This is pure sophistry.

If the taxpayer is entitled to equality within his class, as this Court has held so many times, and such equality must be given even if it requires an assessment reduction *below* true value, as expressly ordered in *Sioux City*, supra, what matter if the original assessment was 200% of true value, 100%, 50%, or 10%? The constitutional requirement is equality of *taxation;* the evil is discriminatory *taxation.* Can this constitutional requirement be thwarted and this evil be perpetrated by the *means* used, that is, by the simple expedient of assessing the taxpayer's property below true value? Of course not. It has been well stated that:

> "The standard of value is but a *means* of achieving uniformity and equality," *Baldwin* v. *Essex County*, 108 Atl. 2d 598, 603 (N.J. 1954).

The California court has made the standard of value the means of *denying* uniformity and equality.

The California decision sanctions an intolerably easy escape from the 14th Amendment's prohibition against discriminatory taxation: Under the logic of the California court, the assessor may *destroy* any business by discriminatory taxation so long as his assessment figure is below the statutory requirement of 100 percent of true value. What if the petitioner herein had been assessed at 99% of true value and the Simpson Companies assessed at 1% of true value? Such discrimination would no doubt be destructive. Yet the argument of the court below would be just as applicable:

"Plaintiff's assessment, which already has been invalidly reduced below true value, should not be still further reduced. Plaintiff has not shown an over-assessment of the property. Rather, he has shown that it was assessed at too little, although still at a higher rate than that of Simpson." (App. p. 26).

The decisions of this Court striking down discriminatory assessments have attached no relevance whatsoever to the fact that the discrimination took place within the framework of fractional assessments.

In *Cumberland Coal* v. *Board of Revision*, 284 U.S. 23, 52 S. Ct. 48, 76 L. Ed. 146 (1931), all coal lands in each township were assigned a uniform estimated market value which was then *reduced in half* for the assessment figure. The petitioning taxpayers argued that the assessors could not assess their lands at an arbitrary uniform value which ignored such factors as accessibility to transportation, etc. The Pennsylvania court replied:

". . . Our answer must be that they may so assess it, and the courts may not alter individual assessments, provided they do not fix the value at a figure in each instance greater than the fair market value of each owner's property, or, as in the cases before us, higher than the percentage of value, here fifty per cent, uniformly fixed throughout the county."

This Court disagreed:

"The petitioners are entitled to a readjustment of the assessments of their coal so as to put

these assessments upon a basis of equality, with due regard to the differences in actual value, with other assessments of the coal of the same class within the tax district." 284 U.S. at 30, 76 L. Ed. at 151.

The courts of other states have followed the doctrines of this Court in situations identical to that presented here. In *Baldwin* v. *Essex County*, supra, the court cited *Sioux City* and the 14th Amendment as authority for striking down a discriminatory assessment although the valuation was only 28% of market value. Citing the 14th Amendment, the New Jersey court has "assured relief against discriminating treatment although it occurred below the true value level," *Gibraltar Corrugated* v. *Township of No. Bergen*, 119 A.2d 135, 138 (N.J. 1955).

The virtual universality of the practice of fractional assessment makes it imperative to resolve any doubt that this Court's mandate for equality applies to fractional assessments.

III

The fact that other classes of taxpayers may be assessed at a higher rate is no justification for refusal to remedy an assessment which discriminates between petitioner and other taxpayers of the same class.

The California opinion suggests that petitioner cannot be equated with others of his class because the discount scheme has given all timberland owners, including petitioner, reductions below full value which were not given other classes of taxpayers, and so a

further reduction to plaintiff would "accentuate the improper existing discrimination" between timberland owners and other classes of taxpayers.

First, we direct the Court's attention to the fact that there was no evidence that such discrimination actually exists, that is, no evidence that the ratios of assessed value to true value were any lower for the various timberland owners than for taxpayers of other classes.[1]

However, more important, the California court's argument is wholly irrelevant.

As demonstrated by the *Sioux City* case, supra, p. 9, state laws as to assessment must give way to the taxpayer's rights under the United States Constitution, and this Court has made it plain that the taxpayer's right under the 14th Amendment is to equality *within his class*:

> The Constitution is not offended by reasonable discrimination between different *classes* of taxpayers:
>
> "It [the state] may, if it chooses, exempt certain classes of property from any taxation at all, such as churches, libraries and the property of charitable institutions. It may impose different specific taxes upon different trades and professions, and may vary the rates of excise upon va-

[1] Note that timber properties in Del Norte County were assessed at "retail market value," which was an arbitrary standard clearly differing from the statutory standard of "full cash value." The court had no basis to conclude that this standard *favored* timber owners; the record even suggests that, despite the discounts, this standard may have *prejudiced* them as against other property owners, R. 229.

rious products; it may tax real estate and personal property in a different manner;" *Bell's Gap R'd Co.* v. *Pennsylvania*, 134 U.S. 232, 237, 10 S. Ct. 533, 33 L. Ed. 892 (1889).

However,

> "The 14th Amendment protects those *within the same class* against unequal taxation; all are entitled to like treatment." *Hopkins* v. *Southern California Telegraph Company*, 275 U.S. 393, 48 S. Ct. 180, 72 L. Ed. 329 (1927) (emphasis added).

The constitutional prohibition against discriminatory taxation "applies *only* to taxation which in fact bears unequally upon persons or property *of the same class*," *Charleston Federal Savings & Loan* v. *Alderson*, 324 U.S. 182, 190, 65 S. Ct. 624, 89 L. Ed. 857, 863 (1944). (Emphasis added)

This Court has consistently reduced assessments and levies which discriminate between taxpayers of a single class, and the opinions plainly attach no relevance whatsoever to the comparative treatment of other classes of taxpayers who are not before the court. See, e.g., the *Cumberland* case, cited supra at p. 12, wherein the petitioning coal land owner was reduced to the same assessment rate as *other coal land owners* in his area.

This makes sense:

First, the California Court's reasoning actually invites the assessor to shield discrimination within a class by *compounding* it with discrimination between

classes. Under the Court's reasoning, the most invidious discrimination within a class could be shielded by an innocuous discrimination between classes.

Further, the plain fact is that the most pernicious discrimination in taxation is discrimination between members of the same class. The market value of the homeowner's property will fall if he is taxed more than his neighboring homeowners, irrespective of how businesses may be taxed. The effects of discrimination within a class are more drastic in taxation of business properties: the very economic life of the shopkeeper, the apartment owner and the timberland owner depends upon his ability to compete. Where that ability is impaired by discriminatory taxation, it is no help to him that he may be favored over others who do not bid against him in his marketplace. Accordingly, where discriminatory taxation puts the taxpayer at a disadvantage with his competitors, he must be given equality *within his class*, even though he and others of his class may be taxed at a lower rate than other classes of taxpayers not in court. If petitioner and his class are in fact taxed at a lower rate than other classes of taxpayers, and if this differential constitutes an unreasonable classification, then members of the prejudiced class may seek their own relief on that ground (here none did). However, a class differential (particularly where, as here, it is not proven either to exist or to be unreasonable) affecting taxpayers not in court cannot be the basis for denying the petitioning taxpayer's constitutional right to equality within his class.

IV

Discrimination between taxpayers of a class must be remedied by direct and immediate relief.

The California decision propounds the astonishing idea that a tax based on an *admittedly void* assessment may be collected and retained by the taxing authority.

The California court's refusal to give relief contradicts the language of the statute governing the procedure employed by petitioner:

> "If the court finds that the assessment complained of is void in whole or in part, it shall render judgment for the plaintiff for the amount of the taxes paid on so much of the assessment as is found to be void." *Revenue and Taxation Code*, § 5141.

More important, the court's refusal to give relief contradicts the rulings of this Court. This Court has made it plain that the unconstitutional discrimination in taxation requires *direct and immediate relief*, that is, a *reduction*.

In the *Sioux City* case, supra, at p. 9, this Court plainly held that the "*right*" of the taxpayer prejudiced by a discriminatory assessment was to "*have his assessment reduced* to the percentage of that value at which others are taxed," 260 U.S. at 446, 67 L. Ed. at 343 (emphasis added).

A reduction must be ordered although the reduction is expressly *prohibited* by the state's statutes. Ibid. (See quote at p. 9, supra.)

A reduction must be ordered although the taxpayer may achieve equality by a statutory procedure for having his competitor's assessment raised. *Township of Hillsborough* v. *Cromwell*, 326 U.S. 620, 66 S. Ct. 445, 90 L. Ed. 358 (1945).

A reduction must be ordered although state officials still have the power to restore equality by increasing the taxes of others. *Iowa-DesMoines National Bank* v. *Bennett*, 284 U.S. 239, 52 S. Ct. 133, 76 L. Ed. 265 (1931). The taxpayer may not be "remitted to the necessity of awaiting such action by the state officials upon their own initiative." 284 U.S. at 247, 76 L. Ed. at 273. In the instant case, the California court remitted petitioner to awaiting corrective action on *future* assessments:

> "Our determination herein doubtless will assure against future use of the discount scale, and lead to proper assessment practices henceforth." (App. p. 26)

The court's assurance has proved hollow; subsequent to its opinion, the Del Norte County Assessor continued to use the discount sale in a modified form which only reduces the *degree* of the discrimination. This demonstrates why direct relief must be given.

As stated in the *Township of Hillsborough* case, supra, "The constitutional requirement is not satisfied if a state does not itself *remove the discrimination.*" 326 U.S. at 623, 90 L. Ed. at 363 (emphasis added). An applicable principle is that found in many opinions of this court involving conflicts be-

tween private individuals and governmental authority: Private constitutional rights are best assured by denying the offending governmental unit the fruits of its offensive conduct. The discrimination here can be removed only by reducing petitioner's assessments to the level of the Simpson assessment.

CONCLUSION

"It is notorious that under-assessment is the cloak for favoritism and inefficiency." Lewis, Equality in Property Assessment, 9 Md. L. Rev. 246, 250. The instant case illustrates this. This court cannot permit the existence of authority for the proposition that its mandates for equality in taxation can be defeated by the common practice of under-assessment. The judgment below must be reversed.

Respectfully submitted,

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APPENDIX

In the Court of Appeal of the State of California
First Appellate District, Division Three

Civil No. 23736

Jones Lumber Company,
a corporation,

Plaintiff and Respondent,

v.

Del Norte County,

Defendant and Appellant.

Dist. Court of Appeal—First Dist.
Filed—June 7, 1967

OPINION

In this action for refund of 1963-64 taxes upon land and timber paid under protest, plaintiff taxpayer had judgment for $14,407.45. Defendant county appeals.

The county assessor determined that as of March 1963 the market value of all old growth timber in the county was $21 per thousand board feet, and that the value of timberland was $20 per acre. He also determined that assessment for ad valorem tax purposes should be at the rate of 25% of this market value. To this basic figure of $5.25 per thousand board feet and $5 per acre, however, he applied a sliding scale of discounts, based solely on the number of board feet owned by a single taxpayer, without regard to whether the total holdings were in a single parcel or in sep-

arate non-contiguous parcels. Under this scale, a taxpayer owning 20 million board feet or less in the county was assessed at $5.25 per thousand board feet and $5 per acre. Each timber owner whose holdings totalled more than 20 million board feet was assessed at a lesser percentage of these figures, according to a curve plotted upon a graph prepared by the assessor.

Plaintiff owned 4,375 acres of timberland containing some 97 million board feet. Its holdings were assessed at 91% of base, or $4.77 per thousand board feet and $4.55 per acre. Simpson Timber Company and Simpson Redwood Company are related corporations, but were treated for assessment purposes as a single owner. Together, they own more than 1½ billion board feet of standing timber in the county. Their holdings were assessed at 48% of base, or $2.52 per thousand board feet and $2.40 per acre. The holdings of Simpson were adjacent to and interspersed among the lands of plaintiff, and one parcel is bordered on its four sides by plaintiff's timberlands.

Plaintiff applied for reduction of its assessment. The county supervisors, sitting as a board of equalization, reduced the assessment to 82½% of base, i.e., to $4.33 per thousand feet and $4.13 per acre. In December, plaintiff paid under protest the $34,463.40 due as taxes on this reduced assessment, and brought this action for refund. The trial court determined that the assessment should be at the 48% rate granted Simpson and entered judgment for plaintiff for $14,407.45, the amount of taxes attributable to the excess assessment it found. Defendant county appeals.

All property in this state is to be taxed in proportion to its value (Cal. Const., Art. XIII, § 1), and shall be assessed at its cash value (Rev. & Tax. Code, § 401, which is the amount at which it "would be taken in payment of a just debt from a solvent debtor" (Rev. & Tax. Code, § 110). The requirement, in other words, is for assessment at the price that property would bring if offered for sale in an open market under conditions in which neither buyer nor seller could take advantage of the exigencies of the other (De Luz Homes, Inc. v. County of San Diego, 45 Cal. 2d 546, 562). It is basic that "all laws of a general nature shall have a uniform operation" (Cal. Const., Art. I, § 11).

The taxpayer is entitled to have his property assessed at the same rate and on the same basis of valuation as is applied to other property of like character and similarly situated. "Inequality of taxation is produced as surely by inequality of valuation as by inequality of the rate of tax." (Birch v. County of Orange, 186 Cal. 736, 741; McClelland v. Board of Supervisors, 30 Cal. 2d 124, 129). "[I]ntentional systematic undervaluation * * * of other * * * property in the same class contravenes the constitutional right of one taxed upon the full value of his property." (Sunday Lake Iron Co. v. Wakefield, 247 U.S. 350, 352-3; Southern Pac. Land Co. v. San Diego Co., 183 Cal. 543, 546; Cumberland Coal Co. v. Board, 284 U.S. 23, 28).

The discount formula necessarily discloses a discriminatory method of assessment. On its face it is

applied to that timber and land whose market value has been fixed by the assessor at $21 per thousand feet and $20 per acre, and the proper assessed value of which he has fixed at $5.25 and $5. It is only after this full comparability has been fixed by him that he applies his scale of discounts. There is no conceivable basis upon which this discount scheme can be held to be other than discriminatory.

Nor does the action of the board of equalization, with all the presumptions of validity and fairness it carries (Universal Cons. Oil Co. v. Byram, 25 Cal. 2d 353, 356-7), immunize the results of that discount system from attack. The board did not discard the discount system and reassess the property. It merely ordered that the assessed value of plaintiff's property "be reduced from 91% of market value to 82½% of market value." Thus, it expressly accepted the assessor's appraisal of market value. Instead of disregarding the discount system, it exaggerated its discriminatory effects as to all taxpayers smaller than plaintiff by giving plaintiff a still greater volume discount than it was entitled to upon the assessor's scale. No fraud by either board or assessor is shown or suggested. But their adjudication may be avoided if the board has proceeded arbitrarily and in wilful disregard of the limitations imposed by law (Universal Cons. Oil Co. v. Byram, supra; Flying Tiger Line, Inc. v. County of Los Angeles, 51 Cal. 2d 314, 320-21). "[O]n the very basis used by the assessor the excessive and unreasonable disparity between * * * assessments * * * is so obvious and inconsistent with

any theory of fair dealing that it cannot be reconciled on the mere presumption that the assessor and board * * * did their duty as they saw it." (Birch v. County of Orange, supra, 186 Cal. 736, 740-1).

We recognize that the elements of accessibility, terrain, species, quality, logging conditions and distance from the market are factors to be considered in appraisal and assessment of timber and timberlands. In the case of a large block of contiguous land held in single ownership, some of these factors are entitled to greater weight, at least as to portions of land and timber. But the system of discounts adopted by assessor and board is based solely on total ownership. It is not limited to contiguous lands. Obviously, there is no reason to assume that a large owner must and will, in every case, sell all and not a part of its holdings, however separated. As pointed out by the trial court, the disparities imposed by this system are based on ownership, rather than property. If an individual owner of many parcels dies, leaving several heirs, the same land will be assessed at a much higher rate to his heirs than it was to him.

We hold that the discount system necessarily works discrimination in assessment and taxation, and must be stricken down.

The remedy chosen by the trial court was to reduce plaintiff to Simpson's 48% assessment. This but exacerbates the discrimination. It increases the invalid discount already given to plaintiff, one of the large timber owners of the county. Even if the assessments

of all county owners of timberlands were reduced to 48% of true value, the burden of the owners of other property—homes, shops and personal property—would be saddled with a disproportionate share of the county budget.

An alternative remedy, consistent with our determination that the discount system is invalid, might be to set aside the entire assessment roll. This drastic remedy is not within the prayer of the complaint. Moreover, the board of equalization is without power now to raise or lower the entire assessment roll (*Rittersbacher* v. *Board of Supervisors*, 220 Cal. 535, 541). The parties agree that time bars collection or refund of 1963-4 taxes resulting from any reassessment save that here in issue. We find no contrary authority. Thus no purpose would be served by vacation of the tax roll for that year.

We cannot, however, affirm the judgment which but accentuates the improper existing discrimination. Plaintiff's assessment, which already has been invalidly reduced below true value, should not be still further reduced. Plaintiff has not shown an overassessment of his property. Rather, he has shown that it was assessed at too little, although still at a higher rate than that of Simpson. Our determination herein doubtless will assure against future use of the discount sale, and lead to proper assessment practices henceforth. No greater benefit to the payers of 1963-4 taxes is within our power.

The judgment, insofar as it directs payment of a

tax refund to plaintiff, is reversed. Costs are awarded to respondent.

DRAPER, P. J.

We concur:
SALISMAN, J.
BROWN (H.C.), J.

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IN THE

Supreme Court of the United States

October Term 1967
No. 714

JONES LUMBER COMPANY,

Petitioner,

vs.

DEL NORTE COUNTY,

Respondent.

Brief in Opposition to Petition for Writ of Certiorari to the Court of Appeal of the State of California, First Appellate District.

To the Honorable Chief Justice and the Associate Justices of the Supreme Court of the United States:

Opinion Below.

The opinion of the Court of Appeal of the State of California, First Appellate District, is reported in 251 A.C.A. 736, 59 Cal. Rptr. 644.

Petition for Hearing by the Supreme Court of the State of California was denied without opinion.

Jurisdiction.

The petition herein seeks to invoke the jurisdiction of this Court under 28 U.S.C. §1257(3). This provision does not afford jurisdiction, as there is not raised herein any substantial or important Federal question.

Jurisdiction is also wanting for failure of petitioner to seasonably raise a Federal question in the State Courts; and decision of the Court of Appeal of the State of California was based on adequate, independent, State grounds. These points will be discussed fully in the argument.

Question Presented.

Where it is established that petitioner is assessed on a basis below that prevailing generally throughout the county, and thereby received preferential treatment to the detriment of county taxpayers generally, is petitioner entitled to further preferential treatment because one single other taxpayer received additional preferential treatment not accorded petitioner?

ARGUMENT.

I.

The Decision of the Court of Appeal of the State of California Involved No Substantial and Important Federal Question.

The basis of the petition is that petitioner's taxes were erroneous and void because the method of discounting value for size of holding was disapproved by the Court of Appeal of the State of California. That Court held the method would result in preferential treatment to the owners of large holdings of timber, including petitioner.

The Court of Appeal of the State of California held, that while the method used was improper, petitioner was not entitled to additional preferential treatment over what it had previously secured. See App. to Pet. Writ, pp. 25-26:

> "The remedy chosen by the trial court was to reduce plaintiff to Simpson's 48% assessment. This but exacerbates the discrimination. It increases the invalid discount already given to plaintiff, one of the large timber owners of the county. Even if the assessments of all county owners of timberlands were reduced to 48% of true value, the burden of the owners of other property—homes, shops and personal property—would be saddled with a disproportionate share of the county budget. . . .
>
> "We cannot, however, affirm the judgment which but accentuates the improper existing discrimination. Plaintiff's assessment, which already has been invalidly reduced below true value, should

not be still further reduced. Plaintiff has not shown an overassessment of his property. Rather, he has shown that it was assessed at too little, although still at a higher rate than that of Simpson. Our determination herein doubtless will assure against future use of the discount sale, and lead to proper assessment practices henceforth. No greater benefit to the payers of 1963-64 taxes is within our power."

This Court has approved substantially the same holding and reasoning. In *Sioux City Bridge Co. v. Dakota County,* (1923) 260 U.S. 441, at page 446 (43 S.Ct. 190, 192; 67 L.Ed. 340, 343), this Court stated:

"This court holds that the right of a taxpayer whose property *alone* is taxed at 100% of its true value is to have his assessment reduced to the percentage of that value at which others are taxed even though this is a departure from the requirement of statute."

Sunday Lake Iron Co. v. Wakefield, (1918) 247 U.S. 350, 353; 38 S. Ct. 495, 496; 62 L.Ed. 1154, 1156:

"The record discloses facts which render it more than probable that plaintiff in error's mines were assessed for the year 1911 (but not before or afterwards) relatively higher than other lands within the county although the statute enjoined the same rule for all. But we are unable to conclude that the evidence suffers clearly to establish that the state board entertained or is chargeable with any purpose or design to discriminate. Its action is not incompatible with an honest effort in new and different circumstances to adopt valuations not rela-

tively unjust or unequal. When plaintiff in error first challenged the values placed upon the property of others no adequate time remained for detailed consideration, nor was there sufficient evidence before the board to justify immediate and general revaluations. The very next year a diligent, and, so far as appears, successful, effort was made to rectify any inequality. The judgment of the court below must be affirmed."

Petitioner assumes that timber land is a separate class of property for purposes of assessment. Under California law all tangible property, real or personal in nature, must be taxed in proportion to its market value and at the same ratio or assessment percentage of market value.

Simms v. County of Los Angeles, (1950) 35 C. 2d 303; 217 P.2d 936;

DeLuz Homes Inc. v. San Diego, (1955) 45 C.2d 546; 290 P.2d 544.

Under California law, in establishing inequitable or unjust burden of taxation the taxpayer is required to show that the assessed value placed upon his property is excessive compared with the average assessment of all other property in the county.

Wild Goose Country Club v. County of Butte, 60 C.A. 339, 212 P. 711 (1922);

Mahoney v. San Diego; 198 C. 388, 397; 245 P. 189; 245 P. 189, 192-193 (1926);

Best v. County of Los Angeles, (1964) 228 C.A.2d 655; 39 Cal.Rptr. 655;

Birch v. County of Orange, (1927) 88 C.A. 82, 86; 262 P. 788, 789-790.

In *Best v. County of Los Angeles, supra,* the court stated at page 660:

> "when it is shown that his assessment is not disporportionate to that of other property generally, to reduce his assessment merely because the property of a few others is assessed too low would only increase the inequalities already existing in the assessment roll of the county."

In *A. F. Gilmore v. County of Los Angeles,* (1960) 186 C.A.2d 471, (9 Cal.Rptr. 67, 71), the Court of Appeal stated the basic rule at page 477:

> "The issue before a reviewing court is whether there was substantial evidence before the board upon which its determination could have been founded. The inquiries which the board makes are: (1) what is the fair market value of the property in question; and (2) whether the assessed value thereof is equal to the product of fair market value and the ratio of assessment values to fair market value prevailing generally throughout the county."

The decisions of the appellate courts of the State of California, on the identical question, are in accordance with the applicable decisions of this Court, and by reason thereof, no substantial or important Federal question is raised justifying the exercise of this Court's jurisdiction.

Rule 19 U.S.S.Ct. Rules;

Rice v. Sioux City Cemetery Co., (1955) 349 U.S. 70; 75 S.Ct. 614; 99 L.Ed. 897;

Layne & Bowler Corp. v. Western Well Works, Inc., (1923) 261 U.S. 387; 43 S.Ct. 422; 67 L.Ed. 712;

Zucht v. King, (1922) 260 U.S. 174; 43 S.Ct. 24; 67 L.Ed. 194.

II.

Decision of the Court of Appeal of the State of California Is Based Upon Adequate Independent State Grounds Therefor.

The California courts have consistently held that a taxpayer, complaining of the impropriety of his assessment, must show that the result is to place a greater burden of tax consequences upon his property than upon other property generally throughout the county.

Wild Goose Country Club v. Butte, (1922) 60 C.A. 339, 212 P. 711;

A. F. Gilmore Co. v. County of Los Angeles, (1960) 186 C.A.2d 471, 9 Cal.Rptr. 67;

Rancho Santa Margarita v. County of San Diego, (1933) 135 C.A. 134, 26 P2d. 716;

Best v. County of Los Angeles, (1964) 228 C.A.2d 655, 39 Cal.Rptr. 665;

Leach v. County of Los Angeles, (1964) 228 C.A.2d 634, 39 Cal.Rptr. 654.

In *Simms v. County of Los Angeles,* (1950) 35 C.2d 303, 217 P.2d 936 (Petition for Writ of Certiorari to this Court denied) the taxpayer complained of the classification of bank trade fixtures as real property whereas other trade fixtures were classified and assessed as personal property. In refusing any tax relief the California Supreme Court stated, page 313:

> "No authority is cited in support of this contention, and we are of the view that mere differences in the classification of like property without attendant inequality of tax burdens do not violate the equal protection clause of the Fourteenth Amendment. . .

"The statement in *Trabue Pittman Corp. v. County of Los Angeles,* 29 Cal. 385, 392 [175 P. 2d 512], that 'There can be uniformity of taxation only to the extent that there is a uniform classification of real and personal property,' is not authority for the proposition that unjustified differences in classification are interdicted by the California Constitution when there is no resulting inequality of tax burdens."

To establish inequality in assessment the taxpayer must show, before the local board of equalization, by competent evidence, that either the market value of his property is less than the determination thereof by the County Assessor, or if the market value be conceded, that the assessment ratio to market value applied to his property is higher than that applied to other property generally throughout the county.

A. F. Gilmore v. County of Los Angeles, (1960) 186 C.A.2d 471; 9 Cal.Rptr. 67;

Best v. County of Los Angeles, (1964) 228 C.A.2d 655, 39 Cal.Rptr. 665;

Leach v. County of Los Angeles, (1964) 228 C.A.2d 634, 39 Cal.Rptr. 654.

Mere errors in method, without resultant discrimination or imposition of an unfair tax burden does not excuse a taxpayer from a payment of his taxes.

Simms v. County of Los Angeles, (1950) 35 C.2d 303; 217 P.2d 936;

Crothers v. County of Santa Cruz, (1957) 151 C.A.2d 219; 311 P.2d 557;

Alberts v. Board of Supervisors, (1961) 193 C.A.2d 225; 14 Cal.Rptr. 72.

Even though the method used is disapproved, unless a taxpayer has been required to pay more than his fair share of the tax burden, no relief is granted.

In *Rancho Santa Margarita v. San Diego County, supra,* page 151, the Court stated:

> "The members of the board had a choice of three courses: (1) To reduce plaintiff's assessment to that of the adjoining lands, thus relieving plaintiff of a large part of its just share of taxes, at the expense of all other taxpayers whose lands were assessed at the same relative value as plaintiff's; (2) to make a horizontal reduction in the assessment of all property except that which was under-valued; (3) to let the assessment stand, as they did, and correct the inequality the following year. The burden of proof was on the plaintiff to show fraud or its equivalent and it cannot be said, under the evidence, that the action of the board, in adopting the third rather than either of the other courses open to it, constituted fraud or the equivalent of fraud."

In the instant case the Court of Appeal of the State of California found that petitioner here had, by virtue of the improper or erroneous method used, been given preferential treatment at the expense of taxpayers generally. It refused to accentuate the discrimination. (*supra,* p. 3). Such decision was in conformity of the established law as set forth above.

Crothers v. County of Santa Cruz, (1957) 151 C.A.2d 219; 311 P.2d 557;

Alberts v. Board of Supervisors, (1961) 193 C.A.2d 225; 14 Cal.Rptr. 72.

It accords with the decision of this Court.

Sunday Lake Iron Co. v. Wakefield, (1918) 247 U.S. 350; 38 S.Ct. 495, 62 L.Ed. 1154.

The decision of the highest court of the state having jurisdiction was not dependent on a Federal question for the determination of the cause. This matter was presented, argued and decided on the basis of California State law. Therefore, the necessary basis for a petition to this Court is wanting.

Lynch v. New York, (1934) 293 U.S. 52, 54; 55 S.Ct. 16, 17; 79 L.Ed. 191, 193;

Henry v. State of Miss., (1965) 379 U.S. 443; 85 S.Ct. 564; 13 L.Ed. 2d 408.

III.

Petitioner Failed to Seasonably Raise a Federal Question in the State Courts, Therefore, This Petition Is Too Late.

The record herein discloses [R. 4] that the case was pled and presented solely on state law through the decision of the Court of Appeal of the State of California. The only reference to a Federal question is contained in the brief in support of the petition for hearing by the Supreme Court of the State of California, filed by petitioner herein, wherein petitioner claimed that the decision was contrary to *Township of Hillsborough v. Cromwell,* (1946) 326 U.S. 620; 66 S.Ct. 445, 90 L.Ed. 358.

A Federal question must be raised at the first opportunity, and an attempt to raise it on a petition for rehearing for the first time, is too late.

Loeber v. Schroeder, (1893) 149 U.S. 580; 13 S.Ct. 934, 37 L.Ed. 856;

American Security Co. v. Baldwin, (1932) 287 U.S. 156; 53 S.Ct. 98; 77 L.Ed. 231.

It cannot be raised by reference to briefs and statements which are not part of the record.

Lynch v. New York, (1934) 293 U.S. 52; 55 S.Ct. 16; 79 L.Ed. 191.

Where the decisions of the state courts have consistently denied relief upon the ground, as here, that the relief sought would exacerbate the discrimination, petitioner should have anticipated such decision and raised the Federal question in the initial proceedings. Petitioner cannot plead ignorance of prior California decisions. Its contention that the Federal question was raised at the first opportunity is without substance.

Herndon v. Georgia, (1935) 295 U.S. 441; 55 S.Ct. 794; 79 L.Ed. 1530.

Conclusion.

Wherefore, it is submitted that the Writ of Certiorari applied for should be denied.

Respectfully submitted,

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